Supreme Court, U.S.
FILED
OCT 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-485

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

GARY MAYNARD, WARDEN,
Petitioner,

v.

CLIFFORD HENRY BOWEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JACK B. ZIMMERMANN
Counsel of Record
JIM E. LAVINE
ZIMMERMANN & LAVINE, P.C.
Five Post Oak Park, Suite 1130
Houston, Texas 77027

PATRICK A. WILLIAMS
WILLIAMS, DONOVAN AND SAVAGE
324 Main Mall, Suite 600
Tulsa, Oklahoma 74104

Attorneys for Respondent, Clifford Henry Bowen
(On Appeal Only)

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

39pp

THE QUESTIONS PRESENTED FOR REVIEW

I. Should this Court grant Certiorari to review the determination by the Court of Appeals that the intentionally withheld evidence regarding the suspect Lee Crowe was exculpatory?

II. Should this Court grant Certiorari to review the determination by the Court of Appeals that the federal district court comported with the requirements of 28 U.S.C. § 2254(d) and was correct in finding as fact that there had been a specific request by the defense for exculpatory evidence?

TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED FOR REVIEW	I
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
CITATIONS TO OPINIONS BELOW	2
STATEMENT OF THE CASE	2
CONCISE STATEMENT OF FACTS	3
SUMMARY OF THE ARGUMENT	11
ARGUMENT	12
RESPONSE TO PROPOSITION I	12
THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW THE DETERMINATION BY THE COURT OF APPEALS THAT THE INTENTIONALLY WITHHELD EVIDENCE REGARDING THE SUSPECT LEE CROWE IS EXCULPATORY.	
RESPONSE TO PROPOSITION II	20
THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW THE DETERMINATION BY THE COURT OF APPEALS THAT THE FEDERAL DISTRICT COURT COMPORTED WITH THE REQUIREMENTS OF 28 U.S.C. § 2254(d) AND WAS CORRECT IN FINDING AS FACT THAT THERE HAD BEEN A SPECIFIC REQUEST BY THE DEFENSE FOR EXCULPATORY EVIDENCE.	
CONCLUSION	22
CERTIFICATE OF SERVICE	24
APPENDIX A	1a
APPENDIX B	1b

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Bowen v. Brown, No. 85-1868 (W.D. Okla. January 22, 1986) 12, 13, 18, 19

Bowen v. Maynard, 799 F.2d 593 (10th Cir. 1986) 2, 12, 13, 18, 19, 20, 21

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963) 17, 22

Moore v. Illinois, 408 U.S. 786, 925 S. Ct. 2562, 33 L.Ed. 2d 706 (1972) 19

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 8 L.Ed.2d 674 (1984) 9

Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764, 66 L.Ed. 2d 722 (1981) 21

United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976) 17, 20, 21, 22

United States v. Bagley, ____U.S.____, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985) 18, 20, 21

United States v. Johnston, 268 U.S. 220, 45 S. Ct. 496, 69 L.Ed. 925 (1925) 14, 21

STATE CASE

Hager v. State, 612 P.2d 1369 (Okl. Cr. 1980) 14

STATUTE

28 U.S.C. § 2254(d) 20, 22

COURT RULE

Sup. Ct. R. 17 ..... 12, 22

NO. 86-485

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

GARY MAYNARD, WARDEN,
Petitioner,

v.

CLIFFORD HENRY BOWEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, Clifford Henry Bowen, respectfully prays that this Honorable Court deny the Petition for a Writ of Certiorari. The parties will be referred to as "the State" (Petitioner in this Court) and "Mr. Bowen" (Respondent in this Court).

CITATIONS TO OPINIONS BELOW

Since the Petition for a Writ of Certiorari was filed, the decision of the United States Court of Appeals for the Tenth Circuit has been published as *Bowen v. Maynard,* 799 F.2d 593 (10th Cir. 1986). It should be noted that a review of the appendices to the Petition indicates that the opinions of the Court of Appeals and the District Court are in reverse order from that listed at page two of the Petition.

Most importantly, the opinion of the Court of Appeals contained an appendix setting out the actual investigation report containing the withheld exculpatory evidence. The Petitioner omitted this in his Appendix A to the Petition. The copy he later sent is very hard to read. Therefore, a printed copy is included as Appendix A to this Brief in Opposition.

STATEMENT OF THE CASE

The Respondent agrees with the Petitioner's Statement of the Case except for the following errors:

1. The Petitioner seeks review by writ of certiorari, and not by appeal, as is stated at page five of the Petition, and

2. The granting of the writ of habeas corpus by the United States District Court for the Western District of Oklahoma was affirmed upon the state's appeal by the United States Court of Appeals for the Tenth Circuit, and not by the United States District Court for the Tenth Circuit, as stated at page six of the Petition.

CONCISE STATEMENT OF FACTS

Because this case involves a factually innocent successful federal habeas petitioner, the facts are summarized according to hearings in the fact-finding courts below.

1. At trial, March 9-13, 1981

On July 5, 1980, Mr. Bowen attended a special holiday rodeo in Tyler, Texas. Twelve witnesses testified that he was at the rodeo until approximately midnight. Further, Johnny Wheeler testified that he attended the rodeo with Mr. Bowen, and called Mr. Bowen's home in Tyler and personally spoke to Mr. Bowen on the telephone after 1:00 a.m. on July 6, 1980. (Tr. 467-531).[1]

Less than one hour later on July 6, 1980, three hundred miles away at the Guest House Inn in Oklahoma City, Oklahoma, three men were shot with a .45 caliber pistol. (Tr. 208). No witness could identify the shooter. The State's case relied on two witnesses who identified Mr. Bowen as the individual who was near the scene prior to the shootings. Mary Chilton, a clerk at the motel, said she observed a man, whom she identified as Mr. Bowen, at about 12:15 a.m. standing near the concession area. The man remained for approximately two hours. He had salt and pepper hair, and was wearing a red baseball cap, a medium blue long-sleeve shirt, blue jeans, and a pair of work boots. (Tr. 293). He did not wear glasses, and his face was almost a white, whitish gray. (Tr. 317). She did not see the shooting. Prior to trial, she had previously identifed William Wayne Simmons as the per-

1. All references to the record at trial and the hearing on the first motion for new trial are to the trial transcript, which is consecutively numbered.

son at the scene. (Tr. 319-321). In fact, Detective Bill Harrison swore in an affidavit that "Mrs. Chilton positively identified William Wayne Simmons. . . ." (Tr. 563). Carrie Pitchford, a motel guest, said she returned to her room about 1:15 a.m. to 1:30 a.m., and looked out her window to see a large man near the concession area wearing a very white t-shirt, bright red cap, and jeans. (Tr. 334-335). His face was very, very white. She identified this man as Mr. Bowen. (Tr. 335). She did not see the shooting. The manager of the motel said he saw a man with a red ball cap near the candy machine shortly after midnight, but could not describe him. (Tr. 359). Later, he saw someone with a red cap shooting, but could not describe the man or his clothes. (Tr. 360-361). Four other witnesses testified that Mr. Bowen had a deep suntan on July 5, 1980. (Tr. 458, 477, 495, 527).

The State introduced rebuttal testimony that a small executive jet could fly from Tyler, Texas to Oklahoma City, Oklahoma in thirty to thirty-five minutes, and could land at a downtown airstrip, that was thirteen minutes by car from the motel. (Tr. 577-584). No evidence was introduced that any such flight occurred on July 5 or 6, 1980.

2. Hearing on First Motion for New Trial, April 29, 1981

Two expert witnesses testified that it was an absolute impossibility for a jet airplane to fly from Tyler to the downtown Oklahoma City airpark due to the length of the airstrip, its location, airplane characteristics, and safety considerations. (Tr. 815-819). This was confirmed by the manager of the airpark, who testified that he was unaware

of any night landing by a jet at his unlighted, non-controlled airfield in the thirty-three years he had been there. (Tr. 831).

3. Hearing on Second Motion for New Trial, September 29-30, 1983

At this state evidentiary hearing, it was stipulated that all of the following evidence was withheld from the defense prior to trial. (Tr. 299)[2]:

In July 1980, in connection with the investigation of the shootings in question, two detectives with the Oklahoma City police department went to Madill, Oklahoma to interview Mrs. Margraves, the mother of Raymond Peters, one of the victims. (Tr. 126). Mrs. Margraves informed the detectives that Patsy, one of Raymond's ex-wives, had come from South Carolina and had been in the Madill area at about the time of the murders. (Tr. 127). Patsy then had a man with her, and Mrs. Margraves was suspicious of the man because Patsy would not introduce him to anyone. (Tr. 127-128). Mrs. Margraves described the man as 6′2″, 225 pounds, salt and pepper hair, and wearing some type of cap. This fit the description of the person given by the scene witnesses. (Tr. 128).

The detectives then went to a farm between Russett and Mannsville, Oklahoma. There they interviewed Jimmy Forguson, brother of Patsy Peters, and Margie Forguson, mother of Patsy Peters. (Tr. 128). The detectives learned that the man with Patsy was Lee Crowe. (Tr. 129). According to Mrs. Forguson, she and Patsy went

---

2. All references to the record at this hearing are to the separate transcript from the hearing on the Second Motion for New Trial.

to a revival meeting in Oklahoma City on the night of the killings. (Tr. 166, 274). Mrs. Forguson believed that Lee Crowe was at home with her husband that night. (Tr. 166). However, no one talked to Mr. Forguson in an effort to confirm this until the summer of 1983. (Tr. 167). To this date, no one has stated under oath that he was with Crowe on that night. (Tr. 170).

Shortly after interviewing these witnesses, the detectives learned that Lee Crowe had applied to be a police officer in Irving, Texas. The detectives traveled to Irving and obtained a photograph of Lee Crowe. (Tr. 282). Detective Horn believes that this trip occurred on July 23, 1980. (Tr. 282).

On July 24, the Oklahoma detectives contacted South Carolina authorities for the purpose of obtaining more information about Lee Crowe. (Tr. 16). The Oklahoma detectives described the suspect to South Carolina authorities as 6'3", 230 pounds, salt and pepper hair, beer gut, jeans, and wearing a baseball hat. (Tr. 18). When the description was completed, the South Carolina authorities immediately identified the suspect as Lee Crowe. (Tr. 269). The South Carolina authorities also confirmed that Crowe had been living with Patsy Peters (Tr. 21, 219), was in his late thirties, (the same age as the suspect) (Tr. 20), commonly used a .45 caliber weapon, (the type of weapon used in the killings) (Tr. 19), commonly used very expensive silver-tipped bullets as used in the killings (Tr. 49, 252), and had traveled to Oklahoma shortly before the killings. (Tr. 23). South Carolina authorities provided a picture and fingerprint card for Lee Crowe. (Tr. 17). They later mailed shell casings from Crowe's police service pistol. (Tr. 29).

On about the same day, a photo spread was shown to Mary Chilton, one of the scene witnesses. (Tr. 133). The witness picked Mr. Bowen, not Crowe, out of the photo spread. (Tr. 133). However, the photograph used in the photo spread showed Crowe with a moustache. (Tr. 157). The man at the scene had no moustache. (Tr. 291). The Oklahoma detectives were aware that Lee Crowe had shaved his moustache at approximately the time of the killings. (Tr. 297). The witness picked Mr. Bowen out of the line-up despite the earlier description of the man at the scene as in his late thirties. (Tr. 158). Furthermore, contrary to the earlier description, Mr. Bowen's face does not appear white in the photo spread. (Tr. 159). Crowe definitely appears more pale than Mr. Bowen in the photo spread. (Tr. 160). The same photo spread was sent to California and viewed by Mrs. Pitchford, the other scene witness. (Tr. 135). She also picked Mr. Bowen out of the same spread (SX-3). Despite the witnesses' identification of Mr. Bowen, the detectives caused the arrest warrant for the murders to be issued in the name of John Doe. (Tr. 156).

On July 28, 1980, the Oklahoma police received information from a confidential informant that Peters was killed because he had "ripped off" Paul Mazzell, and the hit man had come from Charleston, South Carolina. (Tr. 174). Lee Crowe was from Charleston, South Carolina.

Mr. Macy, the District Attorney, testified that his office was aware of the investigation of Lee Crowe. (Tr. 108). He testified that this information was not given to defense counsel for three reasons: the scene witnesses did not pick Crowe out of the photo spread (Tr. 111); Crowe had an alibi (Tr. 112); and Crowe's bullet cas-

ings did not match those found at the scene. (Tr. 112). In reality, the alibi was unconfirmed (Tr. 293), and the scene bullet casings were not connected in any way to Mr. Bowen either. (Tr. 295). Mr. Hardwicke, an Assistant District Attorney who assisted at trial, admitted that when a defense of alibi is involved, identity is the key issue. (Tr. 223). He further admitted that if there was evidence that Lee Crowe matched the description of the shooter, had motive to commit the murder, had the opportunity because he was in Oklahoma, habitually used a weapon of the same caliber as that used in the murder, and had no alibi, this would be exculpatory evidence because it would impeach the eyewitnesses. (Tr. 224).

4. Hearing on the Federal Writ of Habeas Corpus, October 15-17, 1985

In his Motion for an Evidentiary Hearing, Mr. Bowen urged that under 28 U.S.C. § 2254(d), unresolved factual disputes remained on the issue of the withholding of exculpatory evidence; that some facts were not fully and fairly developed in the state court; and that certain factual determinations by the state court were not fairly supported by the record.

Most of the hearing before Judge Brett was concerning the issue of ineffective assistance of counsel. One of the principal omissions alleged was that no formal written *Brady* motion was filed, since the State had relied on that undisputed fact throughout post-trial proceedings. Therefore, both trial defense lawyers and the trial prosecutor testified regarding the existence, nature, or lack of exculpatory evidence, from their perspectives, so that the Court could determine if the error was such that a

reasonable probability existed that a different result would have been reached under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

Frank Wright, the lawyer hired as lead defense counsel, testified he had orally asked the prosecutors for the names of other suspects on several occasions, beginning in January 1981, and that he was told none existed. (Vol. I., p. 114).[3] Robert Macy, the prosecutor, testified that, if the transcript from the hearing on the First Motion for New Trial revealed that he argued to Judge Naifeh that he had discussed the subject of other suspects with Mr. Burger, the transcript would be correct. (Vol. III., p. 22). He also testified that, if the eyewitnesses were impeached, there was a reasonable probability that a not guilty verdict would have been reached. (Vol. III., p. 68).

The State produced, pursuant to federal subpoena, the State report of investigation ("Black Book"), attached hereto as Appendix A. This was not revealed prior to this hearing. In summary form, it disclosed that a week or two prior to the killings, the primary victim, Raymond Peters, had telephoned his ex-wife Patsy and made threats to her from the home of Peters' mother; that Ray had slapped Patsy when she came to the home of Ray's mother just prior to the killings; that Patsy Peters was engaged to Crowe; that Patsy and Crowe had left Oklahoma early on July 6, 1980, the morning that the shootings occurred at 2:00 a.m.; that Crowe had left South Carolina on vacation July 1, 1980; that Crowe had been under investigation as a hit man for the past year; that Crowe had an extremely high temper and was capable of killing

3. All references to the record at this hearing are to the volume and page of the transcripts from the federal hearing which are not consecutively numbered.

anyone for money; that he had previously been suspected of killing the boyfriend of one of his ex-girlfriends; and that Ray Peters had been subpoenaed to testify before a South Carolina grand jury (providing the link to Lee Crowe).

At this hearing, counsel for the State agreed with Judge Brett that the unusual legal issue that needed briefing by the parties was whether a specific oral request for other suspects had the same legal effect as a written request. In the context of that question, *i.e.*, oral versus written, the State conceded that a written request of that nature would trigger the case law test applicable to specific requests. (Vol. IV., p. 47). In reviewing that issue, the District Court stated the concerns courts often encounter when dealing with a disputed claim of an oral request, and then obtained a concession from counsel for the State as to the nature of the request *in the case at bar* as follows:

> The Court: But here, you know, the record indicates that there was a specific oral request made, and it's not contended that it wasn't made.
>
> Mr. Nance (for the State): That's correct.

(Vol. IV., p. 48).

The Court then directed the parties to brief the issue of whether an oral request had the same effect as a written one. (Vol. I., p. 199). The Court had already discussed with counsel for Mr. Bowen the different tests involved if there were a specific request as opposed to a general request (or no request). (Vol. IV., pp. 28-31).

SUMMARY OF THE ARGUMENT

I. The Court of Appeals read the entire record in the case, and held that the withheld evidence was material in the constitutional sense. The Court of Appeals held that the withheld evidence created a reasonable doubt that did not otherwise exist, as well as that the withheld evidence might have affected the outcome of the trial. These were the standards applicable at the time of the trial, depending on the existence or nature of a request for exculpatory evidence. Further, the Court of Appeals held that there is a reasonable probability that had the withheld evidence been disclosed to the defense, the result of the proceeding would have been different, and therefore, it was sufficient to undermine confidence in the outcome of the trial.

The holding of the Court of Appeals is correct, and is based on the propositions that the withheld evidence could have been used to impeach key witnesses and casts grave doubt on the guilt of Mr. Bowen.

II. Because the Court of Appeals held that the withheld evidence met both the pre-1985 test for materiality when no defense request is made, and the post-1985 test for materiality where the existence or nature of a defense request is no longer analyzed, the issue of whether there was a specific request is moot.

Furthermore, the Court of Appeals was correct in affirming the finding of fact by the United States District Court that the State had conceded at the federal hearing that a specific oral request was made. The Supreme Court ordinarily does not grant a writ of certiorari to review evidence or specific facts.

Even absent the State's concession, the record from the state hearing on the Motion for New Trial amply supports the federal judge's determination that such a request was made because the trial prosecutor stated such at that hearing.

Finally, none of the reasons for granting a writ of certiorari set out in Rule 17 of the Supreme Court Rules or case law is established by the Petition.

ARGUMENT

RESPONSE TO PROPOSITION I

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW THE DETERMINATION BY THE COURT OF APPEALS THAT THE INTENTIONALLY WITHHELD EVIDENCE REGARDING THE SUSPECT LEE CROWE IS EXCULPATORY.

Both federal courts below concluded that, under any applicable legal standard, Mr. Bowen had been denied his right to a fair trial because the prosecutorial authorities violated the due process provisions of the United States Constitution by intentionally suppressing exculpatory evidence. They specifically found that the improperly withheld evidence created a reasonable doubt as to Mr. Bowen's guilt that did not otherwise exist, *Bowen v. Maynard, supra,* 799 F.2d at 613, App. 80a;[4] *Bowen v. Brown,* No. 85-1868 (W.D. Okla. January 22, 1986) at App. 39b, 50b,[5] that the improperly withheld evidence

---

4. The opinions in the appendices to the Petition for Writ of Certiorari are cited by the appendix and page number as App.____a or App. ____b.

5. Opinion granting Mr. Bowen's Writ of Habeas Corpus. The opinion is at Appendix B to the Petition and will hereafter be cited to that appendix.

might have affected the outcome of the trial, *Bowen v. Maynard, supra,* at 613, App. 80a; *Bowen v. Brown, supra,* at App. 49b, and that had the improperly withheld evidence been disclosed to the defense, there was a reasonable probability (as that term is defined) that the result would have been different. *Bowen v. Maynard, supra,* at 613, App. 80a-81a; *Bowen v. Brown, supra,* at App. 39b, 50b. The United States District Court stated at the hearing on the State's Motion to Stay his order that what the Court had ruled on the withheld exculpatory material "is absolutely elementary. Elementary." Trans. of Hearing, January 23, 1986, at 3.[6]

The State claims that the improperly withheld evidence is not exculpatory because it does not focus on the truth and justice of the finding of guilt, and therefore, is not material. Apparently this is so, in its view, because no witness put Lee Crowe at the scene. The State wholly misunderstands the concept of mistaken eyewitness identification and the defense of alibi. The United States District Court took judicial notice of the frailties of eyewitness identification (Vol. III., p. 48), and the Court of Appeals stated it was not even necessary to do so. *Bowen v. Maynard, supra,* at 613, App. 79a-80a. In *every* case of mistaken identification and alibi, the person the prosecution witnesses place at the scene is the accused, not another person. The State's argument is tautological, *i.e.,* because no one identified Lee Crowe as present at the scene, evidence that Lee Crowe was the real killer cannot be exculpatory. As an evidentiary matter, what the State ignores is that not only could the eyewitnesses have been discredited in their faulty

6. An excerpt of the transcript from that ruling is attached as Appendix B to this Brief in Opposition.

identification, *id.* at 611, App. 69a, but the police investigation itself could have been shown to be seriously flawed. *Id.* at 612-613, App. 72a, 77a-79a.

Moreover, no one identified Mr. Bowen as the shooter, thus the State relied on circumstantial evidence for conviction. It is undisputed that Oklahoma law requires proof that *excludes every reasonable hypothesis* except the guilt of the accused in such cases. *Hager v. State*, 612 P.2d 1369 (Okl. Cr. 1980). Thus, the withheld Lee Crowe material is exculpatory for the independent reason that it provides another hypothesis other than the guilt of Mr. Bowen. Clearly, this explanation is reasonable, and, under the facts, much more so than that Mr. Bowen was the guilty party.

Although this Honorable Court does not ordinarily grant certiorari to review evidence or discuss specific facts, *United States v. Johnston*, 268 U.S. 220, 45 S. Ct. 496, 69 L.Ed. 925 (1925), withheld exculpatory facts support the conclusion of the Court of Appeals. They showed that Lee Crowe:

1. matched the description of the shooter exactly;
2. travelled with the primary victim's ex-wife half-way across the country from South Carolina to Oklahoma days before the shooting;
3. left Oklahoma early in the morning on the same day of the shooting;
4. had a motive, opportunity, and ability to commit the murders;
5. was under investigation for over a year for being a hit man;

6. habitually carried a .45 pistol, a weapon the same caliber as the death weapon;
7. used silver-tipped hollow point bullets, the same unusual type ammunition used in the offense;
8. took unusual steps to disguise his appearance by suddenly shaving his moustache;
9. had been living with the primary victim's ex-wife in South Carolina before, and in Oklahoma at the very time of the murders, during a period when there had been threats by and physical blows between the primary victim and his ex-wife;
10. prior to the trial, had *no* alibi whatsoever for the time of the murders; and
11. to this day has no *confirmed* alibi for the early morning hours when the crimes were committed.

Whereas, on the other hand, Clifford Henry Bowen:

1. wore eye glasses, and could not see without them, although the shooter wore no eye glasses;
2. was in Tyler, Texas, 300 miles away, at the time the witness Chilton claimed she saw him, according to the sworn testimony of a dozen *non-related* independent law-abiding citizens;
3. had no motive to kill any of the victims;
4. had never been convicted of any crime of violence against the person; and
5. had no contact with or relationship with any of the victims or their families.

Furthermore, when the Court of Appeals reviewed the record in its entirety, it discovered that:

1. the witness Mary Chilton had been hypnotized prior to trial;
2. shortly after the killings, Mary Chilton had identified a William Wayne Simmons as the killer;
3. William Wayne Simmons had been arrested and jailed pursuant to a warrant in which the officer swore Ms. Chilton had *positively* identified Mr. Simmons;
4. Mary Chilton had misidentified a police officer in a line-up, at which she recanted her identification of Mr. Simmons;
5. Mary Chilton claimed to have seen Mr. Bowen at the candy machine between 12:15 and 12:30 a.m.;
6. the prosecutor admitted in argument to the jury that Mr. Bowen had been in Tyler until at least 11:30 p.m.;
7. the trial prosecutor explained to the jury the obvious conflict between his witness Chilton and the many citizens who placed Mr. Bowen in Tyler, Texas at that time by claiming that Mr. Bowen flew from Tyler in a private jet airplane and landed at the Downtown Air Park in Oklahoma City;
8. that it was proven without question at the hearing on the first Motion for New Trial that it was scientifically impossible for a jet plane to land at that airstrip on the night in question because the landing strip was far too short, the airport was unlighted, and no control tower existed;

9. that the discovery by appellate counsel for Mr. Bowen two years after trial of the suppressed evidence led to a witness who had told the South Carolina Law Enforcement Division that she overheard Lee Crowe and the primary victim's wife (Patsy Peters) plan the killing in South Carolina about a week before the murders; and

10. that the information about Lee Crowe, attached as the appendix to the opinion from the Court of Appeals, and attached as Appendix A to this Brief in Opposition, was in the State's files since at least August 10, 1980, seven months before trial, and was there at the time defense counsel were first retained.

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), held that a defendant has a federal constitutional right to information which is favorable to him possessed by the prosecution. In order to establish a violation of *Brady,* a defendant must show that the information was material either on the issue of guilt or the issue of punishment. *Id.* A subsequent decision, *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976), held that if the defendant makes only a general request, or no request at all, he must show that the undisclosed information created a reasonable doubt that did not otherwise exist. This standard of materiality was applied to the instant case by the Oklahoma appellate court, and by the United States District Court and the United States Court of Appeals.

United States v. Agurs, supra, also held that if the defendant makes a specific request, he need only show that the undisclosed evidence might have affected the out-

come of the trial. This standard of materiality was also applied to the instant case by the United States District Court and the United States Court of Appeals.

This was the law governing the prosecutor's duty at the time of Mr. Bowen's trial. As has been emphasized, Judge Brett held as a matter of fact and of law that the withheld evidence met both of these standards, and required reversal. *Bowen v. Brown, supra,* at App. 39b, 45b, 49b-50b. The Court of Appeals held likewise. *Bowen v. Maynard, supra,* at 613, App. 79a-81a.

Subsequent to the instant case becoming final in the state courts, this Honorable Court decided *United States v. Bagley,* ____U.S.____, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985). In *Bagley,* it was held that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.,* 105 S. Ct. at 3381.

The United States Court of Appeals in the case at bar ruled that the issue as to whether *United States v. Bagley, supra,* is retroactive is moot, since it found that the more stringent pre-*Bagley* standard of "creates a reasonable doubt that otherwise did not exist" was met by the facts in this case. *Bowen v. Maynard, supra,* at 603, 613, App. 37a-38a, 80a.

However, should this Honorable Court consider *Bagley* to be applicable to the instant case, its less stringent standard of materiality clearly is met here, and it does away with the previously required analysis of the nature or existence of a request. The Court of Appeals and the United States District Court, both of which read and studied the *record in its entirety,* as required, held that

there was a reasonable probability (as that term is defined) that had the withheld evidence been disclosed to the defense, the result would have been different. *Bowen v. Maynard, supra,* at 613, App. 80a-81a; *Bowen v. Brown, supra,* at App. 39b, 50b.

In view of the sworn testimony of the dozen alibi witnesses placing Clifford Henry Bowen 300 miles from the crime scene, and the total lack of police investigation prior to trial to confirm *Lee Crowe's* alibi, the jurors, or one of them, might have had a doubt about Mr. Bowen's guilt because of, among other things, the lack of thoroughness of the police methods employed in assembling the case against him. In addition to the issue of Crowe's whereabouts, one could query—why wasn't Patsy Peters, the victim's ex-wife, interviewed? Why wasn't the information about the hit-man investigation pursued? Why wasn't Lee Crowe placed in the line-up? Would Deanna Burris, the woman present when Crowe and Patsy Peters planned the killing, have been discovered by an interview with and investigation by South Carolina authorities? The list could go on to illustrate that a misidentification of Mr. Bowen had occurred, and an innocent man was on trial.

Contrary to the State's position, the Court of Appeals did not reject the legal principles in *Moore v. Illinois,* 408 U.S. 786, 92 S. Ct. 2562, 33 L.Ed.2d 706 (1972). Instead the Court of Appeals clearly discussed and distinguished the facts of that case from the facts of the instant case. *Bowen v. Maynard, supra,* at 611-612, App. 69a-71a, 74a-76a.

Proposition I states no reason to grant a writ of certiorari in this case.

RESPONSE TO PROPOSITION TWO

THIS HONORABLE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW THE DETERMINATION BY THE COURT OF APPEALS THAT THE FEDERAL DISTRICT COURT COMPORTED WITH THE REQUIREMENTS OF 28 U.S.C. § 2254(d) AND WAS CORRECT IN FINDING AS FACT THAT THERE HAD BEEN A SPECIFIC REQUEST BY THE DEFENSE FOR EXCULPATORY EVIDENCE.

The State complains that the suppression of the evidence regarding Lee Crowe, even if exculpatory, should not result in reversal of the convictions because it claims it did not concede that a specific oral request was made by the defense for other suspects. This argument fails to support the grant of certiorari for two reasons: 1) it is moot and 2) the habeas fact finder, the United States District Court, found that there was such a request made, and the United States Court of Appeals affirmed that finding of fact based on the hearings in federal and state court.

First, the existence of a specific request for exculpatory evidence is not pertinent to review of the opinion of the Court of Appeals, because the Court below held that the intentionally withheld evidence met the *Agurs* standard applicable when *no* request was made. *Bowen v. Maynard, supra,* at 613, App. 80a. Further, in applying the current standard set out in *United States v. Bagley, supra,* the Court of Appeals held that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bowen v. Maynard, supra,* at 613, App. 80a-81a.

This affirmed the ruling by the United States District Court. Both courts reached the conclusion that, since both the strictest test under *Agurs* and the new test under *Bagley* had been met, the retroactivity of *Bagley* is moot.

Second, the finding of fact by the United States District Court that the State conceded such a request was made is supported by the record of the federal evidentiary hearing, and the State's proposed Findings of Fact and Conclusions of Law therein, and the Court of Appeals so held. *Id.* at 607, App. 50a-53a. It is well established that the United States Supreme Court ordinarily will not grant certiorari to review the evidence or discuss specific facts. *United States v. Johnston, supra.* Furthermore, the Court of Appeals correctly held that the United States District Court complied with the requirements of *Sumner v. Mata,* 449 U.S. 539, 101 S. Ct. 764, 66 L.Ed.2d 722 (1981), *Bowen v. Maynard, supra,* at 609, App. 62a.

It should be noted, however, that the record in the *state* court amply supports the federal judge's conclusion that a request was made, whether or not a concession was made in the federal hearing. The trial prosecutor stated to the trial judge on the Motion for New Trial that the trial defense counsel was not ineffective because, "He was conferring with opposing counsel. They obtained a complete access to our files. He, as he indicated to me when I asked him, *he discussed the possibility of various suspects in the thing.* He did a good job checking into it before trial." (Tr. 973). (emphasis added).

This statement alone would support the federal judge's finding that any factual determination by the state court

to the contrary would be erroneous. 28 U.S.C. § 2254 (d)(8).

Proposition II states no reason to grant a writ of certiorari in this case.

CONCLUSION

The Petitioner has failed to demonstrate that any of the reasons to grant a writ of certiorari set out in Rule 17 of the Supreme Court Rules or case law exist in the instant case.

The State claims in its petition that the federal courts in this case have converted *Brady-Agurs,* into "a license to set aside fairly won convictions because information about a discarded suspect might have helped the defense, even though it in no way indicates the defendant is not guilty." The conviction of an innocent man on mistaken identification by strangers, while the State had in its files much stronger evidence against the probable real killer, cannot be claimed to be a "fairly won conviction." It is a damning indictment of the balance of the prosecutors in the Tenth Circuit for the State of Oklahoma to claim that "countless convictions" are now subject to *Brady* attack. Counsel for the Respondent sincerely hope, as officers of the Court and as former prosecutors, that other prosecutors have not placed countless other persons in the penitentiary, including Death Row, under circumstances as shocking as these.

The Court of Appeals held that the Constitution of the United States had been violated.

The Court was right.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ZIMMERMANN & LAVINE, P.C.

By: _____

JACK B. ZIMMERMANN
Counsel of Record

By: _____

JIM E. LAVINE

Five Post Oak Park, Suite 1130
Houston, Texas 77027
(713) 552-0300

WILLIAMS, DONOVAN AND SAVAGE

By: _____

PATRICK A. WILLIAMS

324 Main Mall, Suite 600
Tulsa, Oklahoma 74104
(918) 583-1338

Attorneys for Respondent,
Clifford Henry Bowen
(On Appeal Only)

CERTIFICATE OF SERVICE

I hereby certify that I have on this the _____ day of October 1986 served a true and correct copy of the foregoing Brief in Opposition to Petition for Certiorari by mailing same by Certified Mail, Return Receipt Requested to:

Michael C. Turpen
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

APPENDIX A

OKLAHOMA CITY POLICE DEPARTMENT
SUPPLEMENTAL/MISCELLANEOUS REPORT

Crime Incident:
FOLLOW UP REF: TRIPLE HOMICIDE

Location of Event:
5200 N. Classen Guest House Motel

Time of Event:
7-6-80

Reporting Officer:
B. Horn

Unit # 638

Comm # 0214

Report Time:
8-10-80 1:30 p.m.

Typist:
gayer 8-10-80 10:30 pm

SUSPECT:
CROW, LEONARD LEE WM/39
Hanahan, South Carolina

WITNESS:

#1 Sheriff Ron Goff
Madill, OK

#2 MAE MARGRAVES WF.50

#3 FORGUSON, JIMMY WM/33

#4 PETERS, AKA: FORGUSON, PATSY WM/25

#5 JAMES CALDWELL
South Carolina Law Inforcement Agency

#6 M. DEAN POWELL
South Carolina Law Inforcement Agency

#7 Sgt. McIntosh, Ervin
Ervin Texas Police Department

#8 Chief Conroy
Charleston, South Carolina Chief of Police.

BODY OF REPORT:

On 7-22-80 Det. B. Horn and B. Cook went to Madill Oklahoma to interview next to kin and attempt to obtain information on possible suspects in reference to triple homicide occurring at the Guest House Motel. Upon arriving in Madill Oklahoma, these Detectives interviewed Sheriff Ron Goff, who knows the victim RAYMOND PETERS.

Upon speaking to Sheriff Goff he recalls that RAYMOND PETERS ex-wife PATSY PETERS, was in the Madill area prior and during the death of her ex-husband RAYMOND PETERS. He also recalls a subject being with PATSY PETERS he described as 6′2″, 225#, having salt and pepper hair. It should be noted that this subject matches the physical description of the suspect in the triple homicide.

Sheriff Goff advised that PATSY PETERS parents this being Mr. & Mrs. FORGUSON, live in Manville Oklahoma which is just north of Madill Oklahoma. He advised that Mr. FORGUSON is a farmer and had lived at this residence all of his life. He also advised that when PATSY was younger she had met RAYMOND PETERS,

who was much older that she was and that RAYMOND PETERS never actually married but transported her to South Carolina, where she became a prostitute.

These Detectives then went to MAE MARGRAVES residence, this being the mother of victim RAYMOND PETERS. Upon interviewing Mrs. MARGRAVES she advised that RAYMOND had lived in Madill most of his life and was an associate of JENO HINES. She also advised that RAYMOND had been married twice, his first wife being DIXIE PETERS, who still lives in Madili Oklahoma and his second wife was PATSY PETERS, who know resides in South Carolina. She recalls a phone conversation which was made from RAY to PATSY approx. a week or two weeks before RAY's death. During the phone conversation she recalls RAY telling PATSY not to come to Oklahoma City, because he did not want to see her. RAYMOND told PATSY that he just wanted to see his two children. RAYMOND threaten PATSY and advised her if she came to OKLAHOMA CITY to see him that he would contact PATSY's parents Mr. & Mrs. FORGUSON and tell them what she really was. RAYMOND then hanged up on PATSY, when Patsy arrived in OKC with the two children PATSY came to Mrs. MARGRAVES residence.

Upon coming to her residence she recalls a subject with PATSY, she described the subject as being a white male in his late 40's approx. 6'2", 225#, having salt and pepper hair and wearing some type of cap. She recalls that this subject did not say anything to anyone he just followed PATSY into the house with the two kids. Mrs. MARGRAVES though it was strange that PATSY talked to everyone but never identifiy the person who was with her. Mrs. MARGRAVES advised that the subject was at

her residence a few days before RAYMOND was killed. Det. Cook advised that he interviewed RAYMOND PETERS oldest son and during the conversation with the son, he was advised that RAYMOND had slapped PATSY while standing outside the house. He also advised that the subject that was with PATSY was not present during this time. These Detectives also interviewed DIXIE PETERS while at Mrs. MARGRAVES residence.

DIXIE PETERS stated that she had not seen RAYMOND PETERS for approx. 6 or 7 years, the interview of DIXIE PETERS was then terminated at this point. MAY MARGRAVES advised that PATSY's parents lived in Manville, Okla. just north of Madill, Okla. MS. MARGRAVES gave the directions on how to get to the FERGUSON'S Residence. These Detectives then proceeded to Manville, Okla. Upon arrival first talked to the son of MS. FERGUSON, this being JIMMY FERGUSON, who lived in a house directly across the highway, MR. & MRS. FERGUSON. Upon interviewing JIMMY FERGUSON he advised that the subject with PATSY PETERS was her fiance LEE CROW, he advised that LEE CROW is a Chief of Police in South Carolina. JIM advised us to contact MRS. FERGUSON, this being his mother who lives across the street and talk to her because she has PATSY's new address and could give us more information in ref. to LEE CROW.

These Detectives then went across the street where officers met MRS. FERGUSON, MRS. FERGUSON advised that PATSY was engaged to a LEE CROW who is Chief of Police in Hanahan, So. Carolina. She further advised that PATSY had learned about the death of RAYMOND PETERS when MAY MARGRAVES had con-

tacted her early Sunday morning, 7-6-80. MRS. FERGUSON advised that she was at OKC at a religious convention 7-6-80 and her daughter PATSY along with LEE CROW and her husband were at Madill, Okla. MRS. FERGUSON advised that PATSY had two three year old children. She further advised that the children were at her residence now and that they are taking care of the children because PATSY and LEE CROW had gone back to So. Carolina early Sunday morning 7-6-80. She advised that LEE CROW was quitting his job in So. Carolina and was going to move to Okla. LEE had applied for a police job in Irving, Texas. They had gone back to pack their belongings to move back to their residence until he could locate a job. MRS. FERGUSON has never liked RAYMOND PETERS because of the way he had treated PATSY when they were married.

While talking to MRS. FERGUSON it appeared that she was extremely nervous and uncomfortable. She gave us a phone number and address so that we could contact PATSY in So. Carolina.

These Detectives then proceeded back to OKC and contacted Irving, Texas P.D. and spoke to Sgt. McINTOSH of the TRAINING division. Upon speaking to Sgt. McINTOSH he advised that LEONARD LEE CROW did apply as a police officer in Irving, Texas. He further advised that they have a photograph of LEONARD LEE CROW. LEE CROW was not accepted as an applicant because of his inability to pass the physical agility test. Sgt. McINTOSH advised that he would give us a copy of the photograph upon our request.

Upon contacting Charlston, So. Carolina these Detectives spoke to Chief Conroy of Charleston and he advised

that LEONARD LEE CROW had been employed in the Sheriff's Dept. in Charleston but had been fired a few years ago, however, he is now employed in Hanahan, So. Carolina, this being a suburb of Charleston. LEE CROW is a Lt. in the Hanahan P.D. Upon advising Chief Conroy of the circumstances involved in the Homicide and also the suspicious nature of the event occurring around PATSY PETERS and her departure from Madill after the Homicide Chief Conroy advised that he had further information that he would give us, however, he first wanted to contact two So. Carolina agents and he would call us back at a later time and fill us in in ref. to LEONARD LEE CROW.

This Detective later received a phone call from JAMES CALDWELL and DEAN POWELL. They advised that they were law enforcement agents from So. Carolina and they wished to speak to me in ref. to CROWE. We were advised that LEONARD LEE CROWE was requested to leave the Hanahan P.D. or he would be fired because of his involvement with known prostitutes and felons. MR. POWELL advised that they had been investigating LEE CROWE for the past year on suspicion of being a hit man. He advised that on several occasions LEE CROWE would leave the state and upon returning they later discovered that where ever he had been had been a HOmicide. Upon advising MR. POWELL that the weapon that was used in the Homicide was a .45 Colt MR. POWELL advised that RAY PETERS carried a .45 automatic with him where ever he goes and he also uses silver tip hollow ammunition. It should be noted that this is the same type of ammunition that was used in the triple homicide. Upon advising POWELL of information we received from HAROLD BEARINGS (CR) BEHRENS in ref. to a sub-

ject who is an associate of RAYMOND PETERS, known only as RICK. We asked POWELL if he had a homicide approx. one and a half year ago where a subject by the name of RICK was abducted from a 7-11 store and taken out, put into a car, and body was never recovered. MR. POWELL advised that they did have a incident which occured in which a RICKY SEGRAVES had been abducted at gun point from a convenience store by two subjects. He advised that this subject was never found. The main suspects in ref. to the disappearance of RICKY SEGRAVES was DANIEL HOGG and another unknown W/M, physical description 6'3", 250#'s. Powell advised that it was suspicioned that RICKY, who is a distributor for dialoted had been holding money back from his connections and they contracted to kill RICKY SEGRAVES. MR. POWELL stated that LEE CROWE has an extremely high temper and that he believes that LEE is capable of killing anyone for money. He recalled an incident where LEE CROWE's ex-girlfriend had a boyfriend who kept bothering her and they had found the boyfriend later with five bullet holes in his head. The weapon that was used was a small caliber pistol and upon contacting LEE CROWE and asking him where his pistol was at he advised he had lost it. MR. POWELL advised that he would attempt to locate photographs and prints of LEE CROWE and send them to our dept. He further advised that he would come to OKC and bring further information. It also should be noted that when LEE CROWE left So. Carolina he had a mustache and upon returning to So. Carolina the mustache was shaved off.

These Detectives then went to Irving, Texas where we obtained a photograph of LEONARD LEE CROWE. A

photo lineup was shown to witness and the witnesses did not identify LEE CROWE. Also a fingerprint card was obtained and comparison made with negative results. DEAN POWELL obtained several shell casings from LEE CROWE when he has practiced on the pistol range and has sent these shell casings to our dept. known comparison with the shell casing to the shell casing which was recovered at the crime scene. Officer Golightly advised that they did not match up.

DISPOSITION AND SUMMARY:

After reviewing the above information the suspect LEONARD LEE CROWE has been eliminated as a suspect, however, So. Carolina advised that they will continue their investigation and if further information is obtained they will contact our police dept. For further information in ref. to LEONARD LEE CROWE see the follow up reports made by Det. Bill Harrison, Det. Bill Cook.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-85-1868-BT

CLIFFORD HENRY BOWEN,
Prisoner #113852,
Petitioner,

v.

JOHN N. BROWN, WARDEN
OKLAHOMA STATE PENITENTIARY,
Respondent.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON JANUARY 23, 1986

EXCERPT—COURT'S RULING ON
MOTION TO STAY

BEFORE THE HONORABLE THOMAS R. BRETT,
Judge.

APPEARANCES:

For the Petitioner:

MR. JACK B. ZIMMERMANN
MR. JIM E. LAVINE
Five Post Oak Park
Suite 1130
Houston, Texas 77027

For the Respondent:

MR. ROBERT A. NANCE
MR. ROBERT W. COLE
Office of the Attorney General
State Capitol
Oklahoma City, Oklahoma 73105

Beebe Caslavka
UNITED STATES COURT REPORTER

* * *

[p. 3]

findings of fact and conclusions of law clearly point out that the exculpatory material in the file of the State should have been disclosed under the United States Supreme Court opinions of *Brady, Agurs* and *Bagley* and the standards set forth therein.

The Court's opinion clearly states—contrary to the comment of counsel, that is respondent's counsel—that had the information been properly disclosed to the defendant and in turn relevant portions thereof introduced in evidence, a reasonable doubt and different result most probably would have occurred in the conviction of the petitioner in this matter.

It is the Court's view on that subject that the record indicates in this case and what the Court has done on that subject is absolutely elementary. Elementary. For that reason the Court does not think there is a likelihood that the respondents will prevail on appeal.

Concerning the irreparable harm to the State, which is criterion number two in the *Battle* case, the State the Court does not think will suffer any irreparable harm in this matter if the Court for purposes of appeal herein requires an appropriate appearance bond to be posted or filed by the petitioner, and I will address that in a moment.

Concerning criterion number three, that a stay will not irreparably harm the petitioner, in the words of the

* * *